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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SEAN and ANGELA O'CONNOR, Plaintiffs and Appellants, v. SUNCAL TESORO, Defendant and Respondent.	B211350 (Los Angeles County Super. Ct. No. PC036633)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Farrell, Judge. Reversed.

Law Office of Leslie S. McAfee and Leslie S. McAfee for Plaintiffs and Appellants.

Jacobs & Associates, Gary P. Jacobs and Wesley S. Wenig for Defendant and Respondent.

While traveling in their Ford Mustang eastbound on Copper Hill Drive in Santa Clarita, approaching the intersection of Avenida Rancho Tesoro, plaintiffs Sean O'Connor and his wife, Angela, were struck head-on by a pickup truck driven in the opposite direction by Lionel Martinez, who crossed over the roadway. Among other defendants, they sued SUNCAL TESORO, LLC (SUNCAL), which was the developer of the Tesoro Del Valle project, including the roadway where the accident occurred. As against SUNCAL, plaintiffs alleged in relevant part that SUNCAL "designed . . . constructed and/or maintained the roadway," and was negligent in failing to design, install, or maintain: (1) "a form of channelization in the roadway that would indicate the routing of a left-turn pocket at the intersection"; (2) "reflective devices that would indicate a left turn and/or center median" or "that would lead a driver to unknowingly [*sic*] cross-over into on-coming east-bound traffic"; and (3) "failing to post adequate signage (reflective and otherwise) indicating a correct route of travel for west-bound traffic including, but not limited to, notification of a left-turn 'pocket,' center median immediately west of the intersection of Copper Hill Drive and Avenida Rancho Tesoro."

The trial court granted summary judgment for SUNCAL on the negligence claim.[1] The court concluded that that SUNCAL could not be liable for any negligence committed before it dedicated the roadway to the County of Los Angeles, and that plaintiffs failed to raised a triable issue that any negligence by SUNCAL caused the accident. Plaintiffs appeal from the judgment, and we reverse.

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[1] Plaintiffs also alleged a cause of action against SUNCAL for premises liability. However, they conceded in the trial court that SUNCAL did not own or control the roadway at the time of the accident, and acquiesced in summary adjudication in favor of SUNCAL on the premises liability claim.

BACKGROUND

I. *SUNCAL's Summary Judgment Motion*

SUNCAL moved for summary judgment on the negligence cause of action on two grounds. First, SUNCAL argued that any negligence in the construction and design of the roadway, including the striping, was attributable to the work of two independent contractors, Sikand Engineering Associates (Sikand) and Timbur General Engineering (Timbur), for which SUNCAL could not be liable. Second, SUNCAL argued that the striping plans were designed and approved by Los Angeles County, and that therefore plaintiffs could not prove that any negligence by SUNCAL was the cause of Martinez's veering into the opposing lanes of traffic.

In support, SUNCAL presented the following evidence.

A. *SUNCAL's Relationship to Sikand and Timbur*

SUNCAL produced evidence that it is a developer of master planned communities, and developed the Tesoro Del Valle project, which encompassed the intersection at issue. In April 2001, SUNCAL entered a written contract with Sikand to perform civil engineering services on the project, including the design and improvement of road plans and striping. In June 2002, SUNCAL entered a written contract with Timbur to construct streets, curbs, gutters and sidewalks, as well as to provide the striping on Copper Hill Drive where the accident occurred.

SUNCAL has no experience in civil engineering, the construction of streets, or striping. Its contracts with Sikand and Timbur were for this project only, and payment was made for work on this project only.

According to the declaration of Bob Barjam, SUNCAL's construction manager, Sikand and Timbur are specialists in their fields and their work was done without direct supervision by SUNCAL. Under their respective contracts, Sikand and Timbur, not SUNCAL, had the right to control performance and the discretion as to the manner of performance.

Barjam declared that before any construction was done, the plans (including those for the subject roadway) were submitted to and approved by Los Angeles County. During construction, inspections were routinely performed by the County, and the work approved. According to the deposition testimony of Gerald Price, who was apparently a civil engineer for Timbur, a roadway cannot be built unless Los Angeles County approves the striping plan. The County is very detailed in its examination of striping plans, making such plans among the most difficult to get approved.

SUNCAL produced a copy of the Los Angeles County Department of Public Works Traffic and Lighting Division Signing and Striping Plan. According to Note 7 on the plan, "All signing shown hereon shall be installed, relocated, or removed by L.A. County Department of Public Works." Ed Ruzak, a civil engineer with 40 years experience in civil and highway engineering, opined in a declaration that, based on his review of the plan, "it is clear that the County of Los Angeles had the sole responsibility for installing any signs on Copper Hill Drive as well as any others shown on the project plans."

Title documents showed that as of September 8, 2002, SUNCAL was not the owner of the land or roadway on the land at Copper Hill Drive and Avenida Rancho Tesoro. Rather, Copper Hill Drive had been dedicated to Los Angeles County.

B. *Causation*

SUNCAL'S evidence on the issue of causation was as follows.

The accident occurred around 4:15 p.m. on April 17, 2004. It was raining heavily, but still daylight. Plaintiffs were traveling east on Copper Hill Drive. In that direction, Copper Hill has three lanes, with the number three lane ending and merging into the number two lane. Martinez was traveling in the opposite direction, west, on Copper Hill. In that direction, the road has two lanes.

The accident occurred near the intersection of Copper Hill and Avenida Rancho Tesoro. On the west side of that intersection, there was a raised divider and a left turn pocket for eastbound traffic (plaintiffs' direction) onto Rancho Tesoro. On the east side of the intersection, there was no raised divider. Rather, there was a painted section like a large gore point marked by diagonal lines to indicate it was not to be used by traffic.

California Highway Patrol Sergeant Diana Johnson, who investigated the accident, testified at her deposition that plaintiffs' vehicle was struck as it travelled eastbound on Copper Hill, before it came to the left turn pocket in the raised divider. Sergeant Johnson determined that Martinez, travelling westbound, passed through the section of the road painted with diagonal lines, and drove to the left of the raised divider (rather than to the right, the correct side for westbound traffic) and into the left turn pocket for eastbound traffic. His vehicle then passed through the left turn pocket and into the eastbound number one lane, and collided with plaintiffs' vehicle. According to the deposition testimony of Sean O'Connor, Martinez's vehicle appeared suddenly in his lane of traffic. O'Connor veered to the right, but was struck.

In his declaration, Ed Ruzak stated: "In regard to the design of the roadway and intersection at issue, my opinion is that the form of painted channelization to

indicate the separate left turn lane, the routing of vehicular traffic, the white painted median striping and the intersection signing provided a clear and concise travel path for . . . Martinez and did not violate reasonable engineering manuals, standards and/or guidelines. Further, the striping plan was in compliance with MUTCD [Manual on Uniform Traffic Control Devices] striping standards." Sergeant Johnson testified at her deposition that when she drove through the area, she had no trouble seeing the painted roadway markings, and that, in a photograph of the area, the painted lines were clearly visible.

With respect to signage, Ed Ruzak declared that the signs on the roadway plans were not designed by SUNCAL, and were to be installed by Los Angeles County. The plan "did not call for a 'Keep Right' sign at the nose of the median." Ruzak found this design to be reasonable and in accord with the MUTCD standards. He also concluded that the curvature of the roadway at the intersection created no sight obstructions and required no "uncomfortable maneuvers." Further, according to the Statewide Integrated Traffic Records system, there had been no similar accidents there, and Sergeant Johnson had no recollection of prior accidents there. Ruzak's ultimate conclusion was that the intersection and the approaches to it did not constitute a dangerous condition, and that the sole contributing cause of the accident was Martinez, who crossed into the wrong direction of traffic.

II. *Plaintiffs' Opposition*

In opposition, plaintiffs argued, in part, that the striping on the roadway directed Martinez into the number one lane of oncoming traffic, thereby causing the accident. Further, plaintiffs argued that a triable issue of fact existed whether

Timbur, which was responsible for installing the striping, was an independent contractor of SUNCAL.

A. *SUNCAL's Right to Control Timbur's Work*

SUNCAL'S subcontract with Timbur described Timbur as the "Subcontractor" and as an "independent contractor." However, plaintiffs pointed to several provisions of the contract which they contended gave SUNCAL the right to control Timbur's work.

The contract with Timbur was prepared by SUNCAL. Under it, Timbur had to commence work within 48 hours of notice by SUNCAL, and had to coordinate its work with all other trades on the project so as not to delay SUNCAL in completing the project. SUNCAL dictated Timbur's insurance requirements for the project: the types of policies, the policy limits, the classification of the insurer ("an insurance carrier with an A.M. Best rating of A-IX or better"), and the form of the polices (Timbur's insurance "shall be on the GL 1986 ISO Occurrence form or such other form as may be approved by [SUNCAL]"). Timbur's policies had to provide for indemnification of SUNCAL for any bodily injury or property damage claims arising directly or indirectly out of Timbur's work.

Before beginning its work, Timbur was required to provide SUNCAL with, inter alia, samples of materials, equipment, and fixtures required under the contract, as well as drawings and calculations required under the contract. SUNCAL retained the right to make changes in the work required to be performed under the contract. At any time, SUNCAL had the right to direct Timbur to remove debris and waste materials in order to maintain the area in a safe and reasonably clean condition.

Timbur had to designate a superintendant to be in charge of Timbur's work, but the person designated was subject to approval by SUNCAL. Moreover, SUNCAL had the right to terminate Timbur without cause. The relevant provision stated: "Notwithstanding any other term or provision of this Subcontract, [SUNCAL] shall have the right to terminate this Subcontract, and/or [Timbur's] right to proceed with the Work or any portion thereof, at any time without cause," whereupon Timbur would be entitled to payment for completed work calculated on one of two formulas.

SUNCAL not only had the right to a final inspection and approval of the work and materials, but "[i]n addition, at any and all times during the manufacture or performance of the Work, all materials and workmanship furnished or performed by [Timbur] shall be subject to inspection, tests and approval by the Project architect/engineer, or by inspectors of [SUNCAL], at any and all places where such manufacture or performance is carried on. . . . In the event that [SUNCAL] requests that any portion of the Work that has been covered be uncovered to determine if such portion of the Work is in accordance with the Contract Documents, [Timbur] shall uncover such portion of the Work." SUNCAL had the right to reject any work it found defective or not in accord with contractual requirements based on its inspection or tests, and to require Timbur to make corrections at Timbur's sole cost and expense.

B. *Causation*

Plaintiffs produced evidence tending to show that the striping on Copper Hill Drive, as a driver approached the intersection with Ranch Tesoro from the east (Martinez's direction), was dangerous and was a cause of the accident.

Sergeant Ronald Lopez, a 13-year Los Angeles Police Department officer who lived near the scene of the accident, filed a declaration in support of plaintiff's opposition. According to his declaration, he arrived at the scene approximately 15 minutes after the accident. He traveled west on Copper Hill Drive, the same route as Martinez. To his recollection, as he approached the intersection with Rancho Tesoro where the white lines were supposed to mark a future left turn pocket for westbound traffic, he was not able to see any white lines on the roadway on the east side of the intersection. The only distinctly visible lines were the double yellow lines which continued west along the south side of the painted island. If a vehicle followed the yellow lines and ended on the wrong side of the road, the concrete island on the west side of the intersection would prevent the vehicle from being able to return to the proper westbound lanes. The instant accident occurred approximately 400 feet west of the intersection, where the island was at its widest point.

Sergeant Lopez had prior experience as a patrol officer investigating traffic accidents (he had written, participated in writing, or approved approximately 500 traffic accident reports). In his opinion, "the roadway and striping were inadequate to properly direct westbound traffic safely . . . particularly under the conditions involved here – overcast skies, wet conditions, windshield wipers and headlights activated – and [were], thus, a significant factor in causing the accident at issue. The only visible markings depicting the lane and location of travel for westbound traffic in the number 1 lane were the yellow lines, and . . . following these yellow lines placed Mr. Martinez' vehicle in the eastbound side of Copper Hill Drive. . . . [T]he location of a concrete island west of the intersection prevented Mr. Martinez from returning to the correct lanes for his direction of travel which resulted in the head on collision of the accident. The white lines were unremarkable, faint, thinly

visible and non-reflective and no reflective devices (such as 'Botts Spots') were in place to cause the white lines to stand out or be more visible."

Plaintiffs also produced a declaration by Harry Krueper, a civil and traffic engineer with extensive experience in evaluating roadway safety and performing accident reconstruction. Relying on his study of the roadway and accident, Krueper declared that "the manner in which the subject roadway was striped . . . created potential gross confusion for users of the roadway. . . . [The] double yellow centerline stripe [which drivers expect to be] used for 'no passing' zones to the left of the path of travel . . . merged through an area that appeared to be a former left turn lane[.] [A] solid white line formed the boundary, on the other side of the island, giving a clear indication that the area where the errant vehicle was traveling would be in a designated route of travel, leading into the opposing traffic flow. . . . Photographs taken by [Sergeant] Lopez, the day after the accident, clearly point[] out the irregularities in striping that existed at the time of the accident, whereby a westbound driver would be brought into the eastbound #1 lane through the lack of positive guidance in the establishment of centerline control and recognition. Vehicle #1 [Martinez] was the opposing westbound vehicle [which collided with] Vehicle #2 going eastbound, . . . creating the damage and injury in this incident."

Krueper also declared that "if the subject roadway had been designed and striped in a consistent manner with what a driver would anticipate, and with the California Vehicle Code, regarding the placement of a centerline stripe to separate opposing traffic flow, the subject accident would not have occurred."

III. *SUNCAL'S Reply*

In reply, SUNCAL argued, in substance, that it had no more control over Timbur's work than a general supervisory right to ensure that the work was satisfactory, which was consistent with Timbur being an independent contractor. SUNCAL also argued that plaintiffs had failed to produce any evidence to show that the striping caused the accident. According to SUNCAL, plaintiffs had no evidence that Martinez's vehicle "crossed over the painted white chevron striping in the [future] left hand turn lane. . . . It is just as possible that Martinez crossed through the subject intersection *after* correctly driving to the right of the painted white chevron lines in the future left turn pocket." (Original italics.) SUNCAL further argued that the declarations of Lopez and Krueper were entirely speculative, because "there is no evidence that the wrong-way driver was misguided by the striping." (Original underlining.)

IV. *The Ruling*

The trial court granted summary judgment. In its written order, the court stated that the roadway was dedicated to Los Angeles County in 2002, and that the County accepted and approved the striping and signage work. Further, the work was done based on plans approved by the County. Based on these facts, the court concluded that there was no "active negligence" by SUNCAL at the time of the accident which could have contributed to the accident, that there was no "negligence or duty of [SUNCAL] that caused the accident," and that "[t]he only potential cause of action for the state of the roadway striping in 2004 is versus the governmental entity owning the roadway."

Although the written order does not explain the court's reasoning, the court's comments at the hearing on the motion provide some additional

explanation. The court orally explained that its ruling was based on a slight reformulation of SUNCAL'S arguments. According to the court, plaintiffs were alleging negligence "against a [party] who is not there in 2004. Their work is completed, essentially, in something like 2002. . . . So this is a developer that has to pay for the roadway. The roadway has to conform to the County's practice, and when they're done they dedicate it to the County. . . . So you're now suing the [party] who worked on the roadway for what would, normally, be a government entity [responsibility]. I don't even see where they have a duty at [the] time [of the accident]. [T]o the extent that they did have any duty . . . it was to conform to the County plans. Once the County accepted it, their duty in terms of [striping] on the roadway, I don't see any negligence on their part." The court concluded that "once [the County] accept[s] it as their roadway, I don't see a cause of action existing [against SUNCAL]. . . . In 2004, [SUNCAL does] not own the premises. And they didn't do anything in 2004. That's when the accident takes place."

The court also found that plaintiff's theory of the accident – that Martinez was directed by the striping to drive into the eastbound lanes – to be "mere speculation."

DISCUSSION

"We review, on a de novo basis, the order granting defendant's motion for summary judgment. [Citation.] In doing so, we apply the same rules the trial court was required to apply in deciding the motion. When the defendant is the moving party, it has the burden of demonstrating as a matter of law, with respect to each of the plaintiff's causes of action, that one or more elements of the cause of action cannot be established, or that there is a complete defense to the cause of action." (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1023-1024 (*Raven H.*))

I. *Dedication of the Roadway to Los Angeles County*

Plaintiffs contend, in substance, that the court erred in concluding that Los Angeles County's participation in the project and SUNCAL's dedication of Copper Hill Drive to the County cut off SUNCAL's potential liability for its alleged negligence in the striping on the roadway. We agree.

The decision in *Fisher v. Morrison Homes, Inc.* (1980) 109 Cal.App.3d 131, is instructive. There, a young boy was killed by an automobile as he rode his bicycle out of a pedestrian walkway into traffic on the intersecting street. His parents brought a wrongful death action against, among others, the developer, Morrison Homes, which had built the pathway as part of a subdivision. (*Id.* at p. 134.) The parents alleged that failing to install barriers where the pathway intersected the street constituted negligence or a design defect. (*Id.* at pp. 134-135.) As some point before the accident, the developer had dedicated the pathway to the City of Pleasanton for public use. (*Id.* at p. 139.) At trial, the trial court granted a nonsuit for the developer, apparently on theory that the City had sole responsibility for the pathway after the dedication. (*Id.* at pp. 135, 136-138.)

The Court of Appeal reversed. It noted that "public liability for injuries occurring on dedicated land may at times be unclear and the distribution of liability between the public and the private developer not susceptible of easy definition. Nor is the public entity's participation in the development, approval, or implementation of the building plans necessarily so pervasive as to exonerate the private developer for its own negligence. We therefore regard as untenable the position respondent urges upon us and decline to confer absolution on all landowners who dedicate their property to the public use from damages which may

thereafter occur, regardless of the extent of their culpability. Nor have we been able to find any authority for such an extreme position." (*Id.* at p. 136.)

The court noted that "the long-established rule in California, adopted with virtual unanimity in other jurisdictions as well [citation], provides that a public contractor is liable for negligence and willful torts, but not for damages necessary or incidental to carrying out work done in accordance with plans and specifications and under the supervision and direction of a public body. [Citations.] [¶] There appears to be no reason why private developers who later dedicate improved real estate to a public entity should not enjoy the same protection. We can conceive of a situation where the degree of involvement by the public entity in the planning and execution of a project may be tantamount to requiring adherence to its specifications. In that case, the developer will not be liable. Elsewhere, the degree of participation will be less and responsibility for subsequent harm shifted accordingly." (*Id.* at p. 139.)

Referring to the case before it, the court stated: "Thus, the nature of the relationship created between the City of Pleasanton and Morrison Homes through the process of design, construction, dedication and acceptance becomes a determinative issue of fact. All we know from the record is that Morrison Homes dedicated an allegedly defective pathway to the city and that the city accepted it for public use. This, we hold, is insufficient to resolve the question of degree of municipal responsibility for the defect-causing negligence." (*Ibid*.)

In the instant case, SUNCAL failed to produce sufficient evidence to show that, as a matter of law, the involvement of Los Angeles County in the design, construction, dedication, and acceptance of Copper-Hill drive was so pervasive as to relieve SUNCAL of its alleged negligence in the striping on the roadway. SUNCAL presented no evidence concerning the circumstances of the dedication of

the roadway to Los Angeles County. As noted in *Fisher*, "where defendant's motivation for dedicating property to public use was not altogether charitable, but rather was prompted by the desire to enlarge the profitability of its enterprise by creating access to its homes via publicly maintained streets, its relationship to the city is the same as that of a private contractor. This means in substance that a developer performs a service in designing and constructing improvements to the real property it eventually deeds away and must accept responsibility for prededication negligence." (*Id.* at p. 138.) SUNCAL failed to produce any evidence to demonstrate that the circumstances of the dedication of Copper Hill Road to the County were such that SUNCAL ought not be liable for alleged negligence in work it performed on the road before the dedication.

Moreover, SUNCAL produced insufficient evidence of the County's participation in the roadway striping so as to relieve SUNCAL of potential liability. According to SUNCAL's evidence, its subcontractor Sikand, not the County, designed the striping, and SUNCAL's subcontractor Timbur, not the County, implemented that design. True, Bob Barjam, SUNCAL's construction manager, declared that the County approved the plans for the development, including those for Copper Hill Drive, made routine inspections, and approved the work. According to the deposition testimony of Gerald Price, apparently a civil engineer for Timbur, the County must approve the striping plan before a roadway can be built, and, because of the County's detailed examination of striping plans, approval is difficult to get. But this evidence proves no more than that the County performed its standard regulatory function of inspection and approval. It does not prove, as a matter of law, the kind of pervasive involvement envisioned by *Fisher* to relieve a developer of liability for negligence. Although SUNCAL produced

evidence that the County was solely responsible for the signage on the roadway, it produced no such evidence concerning the striping.

On this record, a triable issue remains whether SUNCAL may be liable for its alleged, pre-dedication negligence in the design of the striping on Copper Hill Drive, and in the implementation of that design.

II. *Whether Striping Was a Cause of the Accident*

Plaintiffs contend that the declarations of Sergeant Lopez and Harry Krueper raised a triable issue whether defective striping was a substantial factor in causing the accident. We agree.

"'Whether a defendant's conduct actually caused an injury is a question of fact [citation] that is ordinarily for the jury [citation].' [Citation.] '[C]ausation in fact is ultimately a matter of probability and common sense: "[A plaintiff] is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable [persons] may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no [person] can say with absolute certainty what would have occurred if the defendant had acted otherwise. *If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case*." [Citation.]' [Citation.] Those observations are in keeping with the causation analysis expressed in [*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775-776]: '"A mere possibility of . . . causation is not enough; and when the matter remains one of pure

speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." [Citation.]' [Citation.]" (*Raven H., supra,* 157 Cal.App.4th at pp. 1029-1030, italics added.)

A plaintiff is not required to prove that the defendant's conduct was the sole cause of plaintiff's injury. "Rather, it is sufficient that defendant's negligence is *a* legal cause of injury, even though it operated in combination with other causes, whether tortious or nontortious." (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1158.)

Here, SUNCAL's evidence, in the form of Sergeant Johnson's deposition testimony, suggested that Martinez's vehicle, travelling westbound on Copper Hill Drive approaching the intersection with Rancho Tesoro, passed through a section of Copper Hill that was painted with diagonal lines, passed through the intersection and drove to the left of the raised divider (rather than to the right, the correct side for westbound traffic) and then into the left turn pocket for eastbound traffic. His vehicle then passed through the left turn pocket and into the eastbound number one lane, where it collided with plaintiffs' vehicle.

It is true that there is no direct evidence that Martinez was misled by the striping to travel across the roadway and into the eastbound left turn pocket. But that does not mean that plaintiffs failed to meet their burden of raising a triable issue whether the striping was a substantial factor in causing the accident. As a matter of common experience, drivers use roadway striping to guide their travel. Confusing roadway striping can confuse a driver as to the proper route. Here, plaintiffs produced evidence tending to prove that the striping on Copper Hill Drive would guide vehicles into opposing traffic.

According to Sergeant Lopez, "the roadway and striping were inadequate to properly direct westbound traffic safely." Because the white striping was faint and

without reflective devices, the yellow lines stood out, and those lines would direct a vehicle into the oncoming traffic. Similarly, Harry Krueper declared that the striping "created potential gross confusion for users of the roadway," in that the double yellow centerline stripe, which most drivers expect designates a "no passing" zone, merged through what appeared to be a former left turn lane. The solid white line formed the boundary of this lane on the west side of the island, thus suggesting that the area where Martinez's vehicle was traveling would be in a designated route of travel, leading into the opposing traffic flow. According to Krueper, the "[p]hotographs taken by [Sergeant] Lopez, the day after the accident, clearly point[] out the irregularities in striping that existed at the time of the accident, whereby a westbound driver would be brought into the eastbound #1 lane through the lack of positive guidance in the establishment of centerline control and recognition."

From this evidence, the common sense inference arises, based on ordinary experience, that one probable explanation for Martinez's improper route of travel into the eastbound left turn pocket at the intersection of Copper Hill Road and Rancho Tesoro was the confusing striping which tended to channel traffic to that location. This situation is *not* like *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, on which SUNCAL relies. There, the rapist's route to the underground garage where the rape occurred was unknown, and therefore the existence of a broken security gate was not causally related to the attack, thus absolving the building owner from liability. Here, there is no dispute that Martinez crossed the roadway into the eastbound left turn pocket. The question is why. It requires no speculation to infer from the Lopez and Krueper declarations and ordinary experience (*Raven H., supra*, 157 Cal.App.4th at pp. 1029-1030) that the allegedly defective striping, which tended to funnel traffic from the westbound

lanes into the eastbound lanes, was one probable explanation for Martinez's route of travel. Thus, a triable issue exists whether the striping was a contributing cause of the accident.[2]

SUNCAL notes that in the trial court, plaintiffs disputed SUNCAL's factual assertion that Martinez "pulled" across and into a divided section of the road marked with diagonal painted lines. SUNCAL argues that disputing this fact shows that plaintiffs have no evidence that Martinez crossed over the white chevron striping in the left turn lane. However, plaintiffs' reason for dispute was that SUNCAL argued that Martinez's negligent driving was the sole cause of the accident. In conjunction with that assertion, SUNCAL'S statement that Martinez "pulled" across the diagonal stripes suggested a volitional act *in spite of* the roadway striping, rather than an act caused *by* the striping. Thus, plaintiff's reason for the dispute is clearly understandable, and has nothing to do with any supposed lack of evidence of causation.

III. *Whether Timbur Was an Independent Contractor*

Although the trial court did not address the issue, on appeal SUNCAL argues that the grant of summary judgment can be upheld on the ground that Sikand Engineering (which designed the road and striping) and Timber (which performed the road construction and striping) were independent contractors, and

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[2] In the trial court, SUNCAL filed with its reply a separate document containing objections to two isolated statements in the Lopez and Krueper declarations. The trial court sustained those two objections. On appeal, plaintiffs challenge those rulings. We need not discuss the rulings, because we conclude that other portions of the declarations, discussed above, are sufficient to raise a triable issue on causation.

In its reply in the trial court, SUNCAL made other objections to the Lopez and Krueper declarations. The trial court did not rule on them. They are thus forfeited on appeal. (*Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 710.)

that therefore SUNCAL cannot be vicariously liable for their negligence. (See 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1236, p. 615 [employer generally not liable for negligence of independent contractor].) We disagree.

In the trial court, plaintiffs made no showing on the issue whether Sikand was an independent contractor. However, they *did* produce sufficient evidence to raise a triable issue whether Timbur was an independent contractor.

SUNCAL's subcontract with Timbur gave SUNCAL the right to terminate Timbur without cause. This fact strongly suggests that Timbur was an independent contractor. "Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent. [Citations.] The power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities. 'The right to immediately discharge involves the right of control.' [Citations.] It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship. [Citation.]" (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370; see *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 875 (*Toyota*) ["the unlimited right to discharge at will and without cause has been stressed by a number of cases as a strong factor demonstrating employment"].)

Similarly, other aspects of SUNCAL's contractual relationship with Timbur created a triable issue concerning the degree of SUNCAL's control over Timbur's work. Timbur's construction superintendent was subject to approval by SUNCAL. Thus, SUNCAL had the right to control the choice of who supervised Timbur's work. SUNCAL determined when Timbur's work would begin (within 48 hours of

notice). SUNCAL required that Timbur schedule its work in conjunction with other subcontractors so as not to delay SUNCAL in completing the project. SUNCAL had the right to inspect and test Timbur's work on an ongoing basis. It could require Timbur to uncover any portion of its work to permit testing and inspection, could order Timbur to remove debris from the job site at any time, and could reject any work it found defective and change any work required under the contract. These factors tend to prove that SUNCAL's control was not simply related to the result of Timbur's work, but also encompassed the means by which the work was accomplished, creating the inference that Timbur was not an independent contractor. (See *Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425, 431.)

That SUNCAL did not exercise the degree of control granted by the contract is immaterial. "[I]t is not the control actually exercised, but that which may be exercised which is determinative." (*Toyota*, *supra*, 220 Cal.App.3d at p. 875.) Because a triable issue of fact exists whether Timbur was an independent contractor, SUNCAL cannot obtain judgment on the ground that it cannot be held liable for Timbur's negligence in implementing the striping plan.

DISPOSITION

The judgment is reversed. Plaintiffs shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.